

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 25 May 2004

BALCA Case No. 2003-INA-137
ETA Case No. P2002-NJ-02486292

In the Matter of:

UKAY TRUCKING AND DELIVERY ,
Employer,

on behalf of

MESUT GUL ,
Alien.

Appearance: Garo Bakmazian, Esquire
Ridgefield, New Jersey
For the Employer and the Alien

Certifying Officer: Dolores Dehaan
New York, New York

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Mesut Gul ("the Alien") filed by Ukay Trucking and Delivery ("the Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act") and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied

certification and the Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 3, 2001, the Employer filed an application for labor certification on behalf of the Alien for the position of Truck Mechanic. (AF 59-60).

On December 4, 2002, the CO issued a Notice of Findings ("NOF") indicating the intent to deny the application on the ground that the Employer unlawfully rejected three qualified U.S. workers.¹ The CO noted that all three candidates met the minimum requirements and all three candidates were qualified for the position in accordance with 20 C.F.R. § 656.24(b)(2)(ii). The CO found that the Employer, by limiting its recruitment effort to making telephone calls to Applicants #1 and #2, did not show that it made a good faith recruitment effort. The Employer was advised to document a good faith recruitment effort. (AF 40-41).

On January 8, 2003, the Employer submitted its Rebuttal, asserting that it placed telephone calls to Applicants #1 and #2 and left messages. The Employer added that no follow-up letters were mailed to the applicants; however, as the applicants did not return the telephone calls, it was clear that they were not interested in the position. Consequently, the Employer argued that the telephone calls constituted good faith recruitment efforts. (AF 42-43).

On January 24, 2003, the CO issued a Final Determination ("FD") denying certification. The CO disagreed with the Employer's assertion that it made a good faith effort in recruiting Applicant's #1 and #2, as the Employer did not provide proof that either of the applicants received the Employer's telephone messages. The CO found that the Employer's rejection of these two applicants, based solely on their failure to return

¹ As the CO accepted the Employer's rebuttal regarding the unlawful rejection of one applicant, only the rejection of Applicants #1 and #2 will be detailed herein.

messages left on an answering machine, was not a lawful, job-related reason for rejecting the applicants. The CO determined that the Employer failed to document that it made good faith recruitment efforts. (AF 44-45).

On February 26, 2003, the Employer filed its Request for Review and the matter was docketed in this Office on April 8, 2003. (AF 63-65). The Employer asserted that it recruited in good faith and alleged that it lawfully rejected the applicants. The Employer further added that leaving messages on the applicants' answering machines indicates that it made a good faith recruitment effort and the applicants' failure to return the telephone calls showed their lack of interest in the position. Additionally, the Employer argued that it did not have the obligation to hunt down the applicants.

DISCUSSION

The employer bears the burden in labor certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). It is employer's responsibility to recruit in good faith and to document its efforts; a good faith recruitment effort is implicit in the regulations. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988).

The Employer asserted that its recruitment efforts were made in good faith. To support its good faith efforts to recruit the applicants, the Employer made undocumented assertions indicating that it placed unanswered telephone calls to the applicants and left messages on their answering machines.

The state agency referred eight applicants to the Employer in July 2002. (AF 37). The applicants' resumes indicated several alternative methods to contact them.² The Employer asserted that it recruited in good faith because it was willing to wait for the

applicants to call. The regulations do not include passive recruitment as an example of good faith recruitment. On the contrary, the regulations indicate that the employer must actively pursue all the U.S. workers who could qualify for the job opportunity. An employer's failure to establish that it made a diligent effort to contact applicants is a material defect in the recruitment effort. *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990)(*en banc*). An employer is under an affirmative duty to commence recruitment and make all reasonable attempts to contact applicants as soon as possible. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991)(*en banc*).

Additionally, reasonable and good faith efforts to contact potentially qualified U.S. applicants may require more than a single type of attempted contact. *Dianna Mock*, 1988-INA-255 (Apr. 9, 1990). An employer has an obligation to try alternative means of contact, should the initial attempt fail. *Jacob Breakstone*, 1994-INA-534 (Aug. 1, 1996). Where there are a small number of applicants, sending a letter may not be enough to demonstrate good faith, especially when the employer is provided with telephone numbers to contact the applicants. *American Gas & Service Center*, 1998-INA-79 (Jan. 12, 1999). Where certified letters were sent to nine U.S. applicants and none responded, a reasonable effort required more than that single attempt. *Sierra Canyon School*, 1990-INA-410 (Jan 16, 1992). A follow-up attempt to contact applicants is an essential element of the "good faith" recruitment process, and labor certification is properly denied where alternative methods of contact are not utilized and documented. *Divinia M. Encina*, 1993-INA-220 (Jun. 15, 1994).

In this case, the Employer wrongly assumed that it satisfied its duty to recruit in good faith through its willingness to be contacted by U.S. applicants. This meager step shows a minimal effort, if any, and does not equate to a good faith recruitment effort. The employer's effort must show that it seriously wanted to consider the U. S. applicant for the job, not merely go through the motions of a recruiting effort without serious intent.

² Applicant #1 provided a home telephone number, a mobile telephone number and a home address. (AF 25). Applicant #2 provided a home telephone number, a mobile telephone number and an e-mail address. (AF 28).

Dove Homes, Inc., 1987-INA-680 (May 25, 1988)(*en banc*); *Suniland Music Shoppes*, 1988-INA-93 (Mar. 20, 1989)(*en banc*).

The Employer's rejection of the U. S. applicants based on the inadequate recruiting effort did not support the finding that its reasons for rejecting them were lawful and job-related within the meaning of the regulations. *See, e.g., John & Winnie Ng*, 1990-INA-134 (Apr. 30, 1991).

ORDER

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

